formatted), dividing that number by the total number of invoices for the reporting period, and then multiplying that number by 100. BellSouth does not currently have the capability to mechanically implement the measurement in this fashion. Manual review of all orders for accuracy in the manner indicated would be an astronomical undertaking. Although BellSouth has committed to investigate and work to implement this measurement in the required manner over the next 90 - 120 days, BellSouth urges the LPSC to allow BellSouth to continue to implement this measurement in the manner in which it is done today.

Operator Services and Directory Assistance.

31. *Average Speed to Answer*. This FCC-proposed measure is also included in the LCUG.[21] It is incorporated into the Georgia Order and also the Louisiana Interim Measurements, and should be retained.

32. *Percent Answered Within "X" Seconds*. Beyond the Average Speed to Answer Measure contained in the LCUG, the interim measurements contain an additional measure of percentage of calls to directory assistance answered within 12 seconds and percentage of calls to operator services within 10 seconds as required by the Georgia Commission.

Interconnection.

The LCUG and the Georgia Order are silent on the issue of measurements for Interconnection. The FCC proposed rule making includes measurements for interconnection and the Louisiana Interim Measurements contain even more detailed measurements in this area.

33. - 34. *Trunk Group Service Report - Interconnection and Common Trunks* . These measurements were not required by the Georgia Commission nor were these

[21] *See* LCUG-OS/DA.

items measured in the LCUG. The FCC proposed a measurement of blockages encountered on interconnection trunks as a percentage of total interconnection trunks provided for a reporting period. The interim measurement goes further than this and specifically measures the total number of local trunk groups, number of CTTG trunk groups measured, and the number of trunk groups with blocking factors exceeding the blocking threshold in one or more hour measurement intervals during the report month.

35. *Comparative Trunk Group Service Summary.* As an additional measurement (not required by the FCC or Georgia), BellSouth's interim measurements include this comparison of the number of trunk groups exceeding the threshold.

36. *Trunk Group Service Detail.* Also as an additional measurement (not required by the FCC or Georgia), BellSouth's interim measurements include this detailed listing of all final trunk groups, including actual blocking performance. The measured blocking equals the total number of blocked calls to the total number of attempted calls times 100.

Collocation.

The Georgia Order did not include any collocation performance measurements nor did the proposed measurements adopted by the LPSC. BellSouth proposes herein to add these measurements.

37. - 38. *Collocation - Average Response Time and Collocation - Average Arrangement Time.* These functions measure the average time it takes BellSouth to respond to a request for collocation and also to arrange for the requested collocation. They are identical to the measurements proposed by the FCC.

39. *Collocation - Percentage of Due Dates Missed.* This measurement supplies the number of orders not completed with BellSouth's committed due date as a percentage of the total number of orders scheduled for completion. It is identical to the measurement proposed by the FCC.

911/E911.

This is another area in which the Louisiana interim measurements exceed those required by the Georgia Commission and incorporate items from the FCC's proposed rule making. The Georgia Order does not contain measurements in this area. The Louisiana interim measurements contain two measures designed to provide data concerning the quality and accuracy of 911/E911 service provided to the CLECs.

40. - 41. *E911 Accuracy and Timeliness.* Under the interim measures BellSouth gauges E911 accuracy by taking the total number of service order interface records (SOIRs) with errors generated from Daily TN activity as a percentage of the total number of such orders for E911 updates times 100. It measures E911 timeliness by taking the number of confirmed orders minus the number of orders missed in the reporting period as a percentage of the total number of orders confirmed in the reporting period times 100.

C. BellSouth's Performance Measurements Contemplate Reasonable Reporting Procedures

At least one Intervenor criticized BellSouth's measurements as proposed on April 30, 1998 because they did not expressly set forth any provisions for review and analysis and because they did not confer a mandatory right of audit upon CLECs receiving the information.

BellSouth concurs with the obvious proposition that performance measure reports should be available to CLECs ordering from BellSouth and to the LPSC. BellSouth also concurs with the FCC and the Georgia Public Service Commission that reports should generally be provided separately for (1) BellSouth's own retail customers; (2) BellSouth's affiliates that provide local exchange service; (3) competing carriers in the aggregate; and (4) individual competing local carriers.[22] BellSouth posts aggregate BellSouth and CLEC performance reports on its web site on a monthly basis.[23] Individual CLEC reports and the data for these reports are posted on the Internet site after the CLEC requests access.[24] Individual reports and data are password protected and will not be available to other CLECs. Subject to CLEC consent, the individual CLEC reports could be available to state commissions under existing proprietary rules. Finally, BellSouth already provides CLECs with audit rights. CLECs may audit on an ad hoc basis, with 30 days advance notice. The auditing party, as is common, must be prepared to reimburse reasonable ILEC costs.

III. THE COMMISSION SHOULD REJECT THE SEVERELY BURDENSOME RECOMMENDATIONS OF THE LCUG

A. The LCUG measurements are designed to inhibit competition.

The appropriate goal for the Commission in this docket is to endorse those measurements necessary to detect discrimination, while minimizing the burdens imposed on the ILECs.[25] The appropriate goal is not to accept the LCUG agenda of maximizing the burdens on ILECs. The LCUG document is grossly unreasonable, both in the level of geographic and product

[22] *See* FCC NPRM, ¶ 39; Georgia Performance Measurements Order, at p. 26.
[23] This information is available through BellSouth's interconnection web page. http://www.CLEC.bellsouth..
[24] The CLEC must also have signed an interconnection agreement. There must also be sufficient activity to produce meaningful data.
[25] *See* FCC NPRM, ¶¶31 & 36.

disaggregation it recommends and the number of unworkable measurements it proposes beyond the many measurements already implemented by BellSouth.

AT&T supported the LCUG proposal in its initial comments in this docket, and most Intervenors support that document. Recently, AT&T and MCI filed comments in the FCC NPRM that included demands for even greater levels of disaggregation and/or measurements. BellSouth fully expects this pattern to continue. These demands for continually increasing numbers of measures and reports may well prove to be never ending.

1. **Level of Disaggregation**. While the benefits of further disaggregation remain elusive and undocumented, the direct costs are large and concrete. The disaggregation urged by CLECs such as AT&T and MCI would have BellSouth report on over 24 *million* data elements each month. A conservative estimation of the direct costs of various levels of disaggregation is shown in Figure 1 below.

Yearly Cost Chart Based on $.10 per Data Element

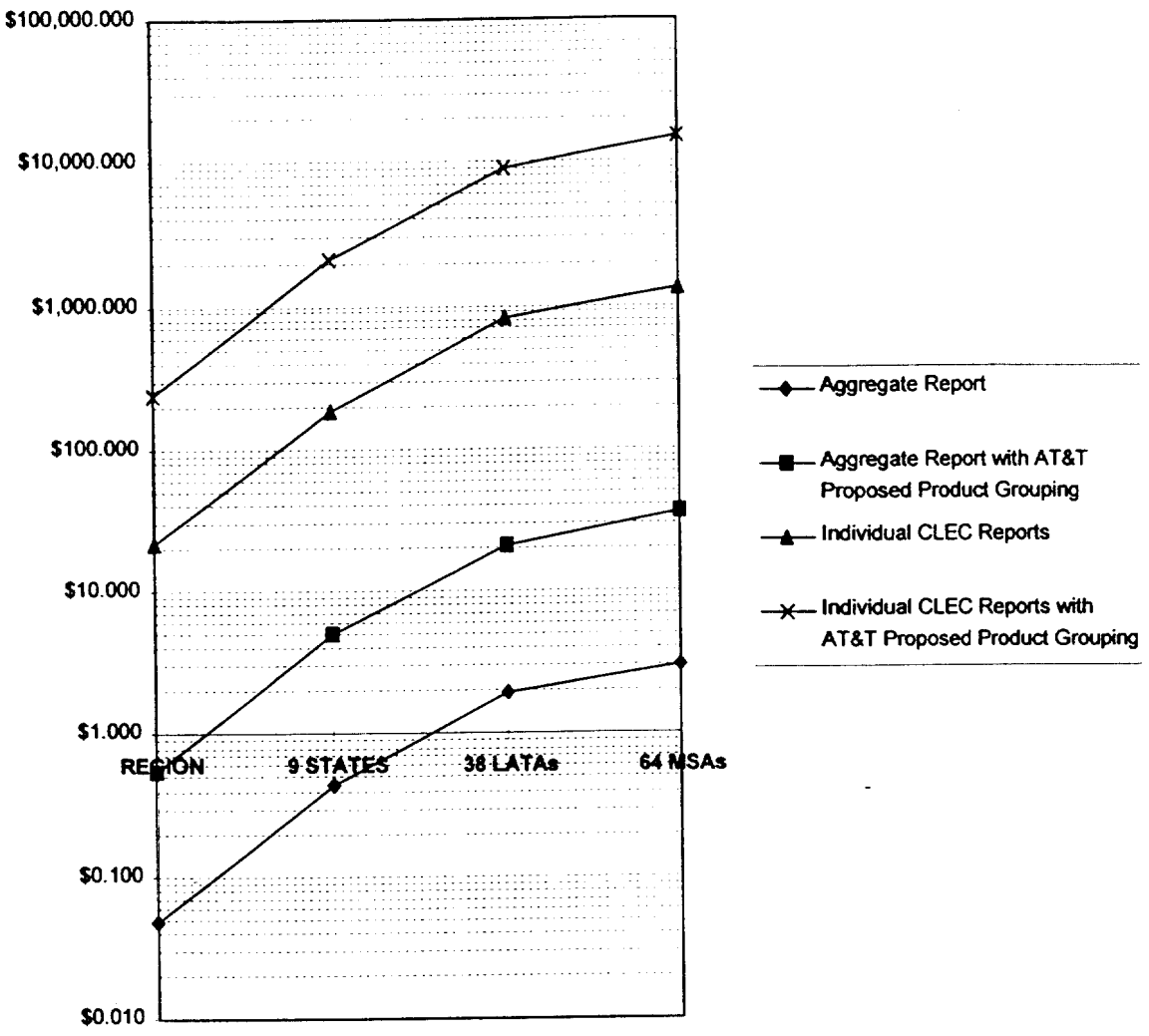

Figure 1

The yearly cost for BellSouth to provide performance reports as set forth in BellSouth's measurements would be about $206,000, based on a 5-year projected average (individual CLEC reports for 9 states).[26] Increased disaggregation exponentially increases the costs involved.

[26] These costs were conservatively estimated. BellSouth did a 5 year cost analysis beginning with 1998 and ending with 2002. This analysis took into consideration the estimated average cost associated with salaries, capital and

Adopting AT&T's proposed product groups for reporting increases costs by more than a factor of ten, to over $2 million per year. MSA level reporting combined with AT&T's product groupings would cost BellSouth over $15 million per year.

2. Measurements That are Literally Impossible to Implement. Many of the LCUG measurements are simply unworkable and cannot be reasonably implemented. For example, the Network Performance measurements proposed by LCUG would wreak havoc among both BellSouth and CLEC end users while placing an untenable burden upon BellSouth. Under the LCUG proposal, as BellSouth understands it, a statistical sample of network configurations for CLEC customers must be selected. A similar sample of customers is taken from BellSouth's retail base. Then, every month, each customer's service is subjected to transmission quality, speed of connection, and reliability testing. Many of these tests require the customer to be taken out of service. Stated simply, the LCUG proposal on network performance requires taking numerous customers out of service. The administrative costs to accomplish such a task would be significant.

The LCUG proposal obviously contemplates that BellSouth coordinate these out of service tests with each and every CLEC and CLEC end user as well as each BellSouth end user. Needless to say, this aspect of the LCUG proposal, if adopted, would introduce an undetermined, but undoubtedly significant, additional cost to BellSouth's operations. In addition, the LCUG proposal would impose an onerous burden upon BellSouth by requiring it to attempt to reach and coordinate out of service conditions with each CLEC and every affected CLEC and BellSouth end user every month.

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expense over the 5 year period divided by the total number of data elements currently supported in the BellSouth Service Quality Measurements.

III. There is No Need for This Commission to Create Technical and Performance Standards at This Time

MCI argued in its earlier Comments in this proceeding that the Commission must develop performance standards or benchmarks. The LCUG has also contended before the FCC and the Georgia Commission that performance standards should be established whenever a reasonable ILEC analog does not exist. BellSouth submits that establishing any kind of idealized standards for performance at this time would be premature. Instead, the Commission and the CLECs operating in Louisiana should first monitor and analyze concrete data furnished under the interim measurements, and then permit the parties to negotiate individualized performance standards tailored to the needs of individual parties or, as a last resort, consider establishment of "one size fits all", uniform standards. As explained by the FCC in initially rejecting the establishment of performance standards:

> There is little in the current record to explain how such standards would be used as a method of evaluating compliance with statutory requirements. Moreover, any model performance standards should be grounded in historical experience to ensure that such standards are fair and reasonable. Because our present record lacks the necessary historical data, we believe that it would be premature for us to develop standards at this point. We tentatively conclude, therefore, that we should postpone consideration of performance standards until parties have had the opportunity to consider how they would be used and have been able to review actual performance data over a period of time.
>
> FCC NPRM, ¶ 125, at pp.53-54.

IV. UNPRECEDENTED ENFORCEMENT MECHANISMS ARE UNCALLED FOR AT THIS TIME.

BellSouth concurs with the need for a procedure for expedited dispute resolution relating to performance measures and reporting. BellSouth supports the dispute resolution process adopted by the Georgia Commission in its recent order. There is no need to establish redundant

and possibly conflicting processes for dispute resolution. Use of the same process now being established by the parties in Georgia is the most cost-effective and efficient way to proceed.

Under the Georgia procedures, when a performance dispute arises, BellSouth and the CLEC must immediately assemble a Joint Investigative Team comprised of subject matter experts. The team is to be co-chaired by representatives of BellSouth and the CLEC, respectively. The investigative team will conduct a root-cause analysis to determine the source of the problem, if one exists, and then develop a plan for remedying it. The parties to the dispute must escalate the issue within each company to the person who has ultimate authority in an effort to achieve a resolution.

If the dispute cannot be resolved between the companies after these steps are taken, then either party to the dispute may file a formal complaint with the Commission through the Director of the Case Management Section, for binding mediation. The Director of Case Management, or his or her appointee, shall rule upon the complaint within 15 days of its filing. If either party is then aggrieved, it may file a formal complaint with the Commission. This process can be readily adapted to the procedures in place with the LPSC today, with the Administrative Law Division substituting for the Director of Case Management.

In its initial comments in this docket, MCI also argued that an elaborate system of "self-executing" enforcement penalties should be implemented immediately. There is no basis whatsoever for this Commission to deviate from its standard enforcement procedures for the sake of CLECs only. This Commission has a full set of rules and procedures in place for the filing of complaints and the enforcement of its rules, and has ample constitutional authority to impose whatever penalties it deems appropriate. Not a single CLEC in Louisiana has taken advantage of

these procedures. Until it can be demonstrated that the process in place for everyone else in Louisiana is inadequate, this Commission should not put into place extraordinary rules that benefit CLECs only.

CONCLUSION.

For the reasons set forth herein, BellSouth urges the Commission (1) to endorse as final the interim Service Quality Performance Measurements in Attachment A with the modifications proposed herein; and (2) to monitor the data provided under these measurements for a 12-month period and then re-examine any need for further modifications based on actual experience and not speculation.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all parties of record by hand or Federal Express, postage prepaid, on this 10Th day of July, 1998.

VICTORIA K. McHENRY

#125944

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 98-121
Application of BellSouth Corporation,	)	
BellSouth Telecommunications, Inc.	)	
and BellSouth Long Distance, Inc.	)	
for Provision of In-Region, InterLATA	)	
Services in Louisiana	)	

Exhibit W:
MCI Telecommunications Corp. v. Bell Atlantic-Virginia, Inc.,
No. 3:97CV629 (E.D. Va. July 1, 1998);
U.S. West Communications, Inc. v. MFS Intelnet, Inc.,
No. C97-222WD (W.D. Wash. Jan. 7, 1998)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MCI TELECOMMUNICATIONS CORPORATION,

and

MCIMETRO ACCESS TRANSMISSION SERVICES OF VIRGINIA, INC.,

and

AT&T COMMUNICATIONS OF VIRGINIA, INC.

Plaintiffs.

v.

BELL ATLANTIC-VIRGINIA, INC.,

and

HULLIHEN WILLIAMS MOORE, I. CLINTON MILLER, THEODORE V. MORRISSON, in their official capacity as Commissioners of the Commonwealth of Virginia State Corporation Commission

and

COMMONWEALTH OF VIRGINIA STATE CORPORATION COMMISSION

Defendants.

Civil Action Number 3:97CV629

FINAL ORDER

THIS MATTER comes before the Court on Cross Motions for Summary Judgment submitted by each party to this action. For the reasons stated in the accompanying Memorandum Opinion, the Court GRANTS summary judgment in favor of the SCC. The SCC has complied with the requirements of the 1996 Act and has neither erred as a matter of law nor made arbitrary

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or capricious findings of fact.

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

James R. Spencer
UNITED STATES DISTRICT JUDGE

July 1 1998
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MCI TELECOMMUNICATIONS CORPORATION,

and

MCIMETRO ACCESS TRANSMISSION SERVICES OF VIRGINIA, INC.,

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Plaintiffs.

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and

COMMONWEALTH OF VIRGINIA STATE CORPORATION COMMISSION

Defendants.

Civil Action Number 3:97CV629

MEMORANDUM OPINION

THIS MATTER comes before the Court on Cross Motions for Summary Judgment submitted by each party to this action. The plaintiffs in this action are MCI Telecommunications Corporation and MCImetro Access Transmission Services of Virginia, Inc. (collectively, "MCI"). AT&T Communications of Virginia, Inc. ("AT&T") is an intervenor plaintiff. Bell Atlantic-

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Virginia, Inc. ("Bell Atlantic") is named defendant and has filed counter claims. The Commonwealth of Virginia State Corporation Commission and its Commissioners, sued in their official capacity, Hullihen Williams Moore, I. Clinton Miller, and Theodore V. Morrison, Jr. (collectively, "SCC") are defendants. For the reasons stated herein, the Court GRANTS summary judgment in favor of the SCC. The SCC has complied with the requirements of the 1996 Act and has neither erred as a matter of law nor made arbitrary or capricious findings of fact.

INTRODUCTION

Historically, regulation in the telecommunications field centered on the idea that service could be provided at the lowest cost to the most consumers through a regulated monopoly network. With regard to local monopoly networks, State utility commissions, such as the SCC, regulated the prices and practices of the monopolies and protected them from the entry of competition. See Communications Act of 1934, § 2(b), as amended 47 U.S.C.A. §152(b). These barriers to competition became outdated as technology advanced. Congress reconsidered the assumptions behind protecting local monopolies from competition and enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act").

The 1996 Act mandates a new competitive structure by preempting state and local barriers to market entry. To shift monopoly markets to competition, the 1996 Act provides three interrelated means new entrants may access the local market. First, entrants may construct new local network facilities that would be interconnected with existing networks of incumbent local exchange carriers. See 47 U.S.C. § 251(c)(2). Next, new entrants may lease from incumbents at cost-based rates the incumbents unbundled network elements. See 47 U.S.C. §251(c)(3), 47 U.S.C. § 153(29). Finally,

entrants may purchase at wholesale the incumbent's existing retail services. 47 U.S.C. § 251(c)(4). Potential new entrants may pursue each option separately or in any combination.

To protect the viability of these options, Congress imposed specific obligations on incumbent local exchange carriers ("ILECs") in section 251 and developed specific pricing standards in section 252. With regard to section 251, Congress directed the FCC to "complete all actions necessary to establish regulations to implement the requirements of [section 251]." 47 U.S.C. § 251(d)(1). Pursuant to this mandate, the Federal Communications Commission ("FCC") issued regulations and an order entitled In re Implementation of the Local Competition Provisions of the Telecomms. Act of 1996, CC Docket No. 96-98 (FCC Aug. 8, 1996)("First Report and Order"). Section 252 establishes procedures for negotiation, arbitration, and approval of agreements. See, generally, 47 U.S.C. § 252.

Under the procedures embodied in §252, the new entrant and the incumbent local exchange carrier must reach an agreement upon receiving a request for interconnection, services or network elements pursuant to § 251. This agreement, commonly referred to as an interconnection agreement, may be reached through voluntary negotiations, mediation or compulsory arbitration. The State commission then approves or rejects the agreement and makes written findings with regard to any deficiencies. 47 U.S.C. § 252(e). In the alternative, the FCC will approve or reject the interconnection agreement whenever a State commission declines to consider an interconnection agreement or fails to render a disposition within ninety days. See 47 U.S.C. § 252(e)(4)-(5). Whenever the State commission does make a determination under § 252, any aggrieved party may bring an action in a Federal court of competent jurisdiction to determine whether the interconnection agreement meets the requirements of § 251. See 47 U.S.C. § 252(e)(6).

FACTUAL BACKGROUND

MCI and Bell Atlantic entered negotiations regarding interconnection but were unable to resolve all issues. On August 26, 1996, MCI filed a petition with the SCC for compulsory arbitration pursuant to section 252(b). Similarly, AT&T formally requested Bell Atlantic to negotiate a Virginia interconnection. Once AT&T and Bell Atlantic failed to resolve of all underlying issues, AT&T petitioned the SCC for compulsory arbitration on July 15, 1996. On September 11, 1996, the SCC consolidated certain issues in MCI's petition with similar issues in the petitions filed by AT&T and Cox Fibernet Commercial Services, Inc.[1] The consolidated issues included the determination of the appropriate wholesale discount interim rates, rates for unbundled network elements and interconnection where proxies were not available, and interim number portability.

In an effort to resolve the disputed matters, the SCC conducted hearings from October 10-12, 1996 and considered post-hearing briefs submitted on October 28, 1996. On November 8, 1996, the SCC issued an Order Resolving Wholesale Discount for Resold Services ("Wholesale Order") Record, p. 3279-84, and an Order Setting Proxy Prices and Resolving Interim Number Portability, ("Proxy Pricing Order") Record, p. 3286-90. Later on November 13, 1996, the SCC issued an Amending Order revising the wholesale discount rate set in its November 8 Order. Record, p. 3292-94. The SCC denied Bell Atlantic's petition for reconsideration on December 2, 1996.

Additional hearings on unresolved issues between Bell Atlantic and MCI were held on December 16, 1996 and resulted in a December 20, 1996 Order ("Arbitration Order") implementing

[1]Cox Fibernet Commercial Services, Inc. is not a party to the instant litigation.

certain stipulations between the two parties and directing them to submit an interconnection agreement incorporation the applicable findings within 60 days. Record, p. 4181-83. Again, the parties were unable to resolve certain issues and submitted a petition the SCC on the remaining unresolved issues. The SCC conducted hearings on February 19, 20 and 28 and issued an Order Resolving Non-Pricing Issues on May 8, 1997. Record, p. 5417-23. Bell Atlantic and MCI were directed to file an interconnection agreement within 30 days. Id. After the Commission granted an extension, Bell Atlantic filed an interconnection agreement on June 16, 1997 which the SCC subsequently approved on July 16, 1997. Record, p. 5882-86. One effect of this approval permits Bell Atlantic to exclude the portion of its Virginia database that has names, addresses and telephone numbers for residents and businesses in the metropolitan Washington area, including Maryland.[2]

On August 15, 1997, MCI filed this action pursuant to section 252(e)(6) of the 1996 Act to challenge final arbitration determinations made by the SCC. MCI's Complaint contains nine allegations or counts including: (1) SCC failure to require Bell Atlantic to Provide Unbundled Dark Fiber; (2) SCC failure to require Bell Atlantic to provide subloop unbundling ; (3) SCC adoption of non-cost based rates for non-recurring charges; (4) SCC failure to include performance measures, performance standards, reporting and noncompliance compensation mechanism; (5) SCC failure to require nondiscriminatory access to directory assistance database; (6) SCC failure to require Bell Atlantic to provide two-way trunking[3]; (7) SCC failure to require license of intellectual property

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[2]Bell Atlantic and AT&T reached an interconnection agreement after a similar series of hearings and orders addressing unresolved issues. On August 5, Bell Atlantic and AT&T filed its interconnection agreement which the SCC approved on September 4, 1997.

[3]As an initial matter, the Court notes that MCI withdrew Count VI (Two-Way Trunking). MCI Mem. in Support of Motion for Summary Judgment, p. 11, fn. 9.

rights and intellectual property indemnification; (8) SCC's imposition of unreasonable restrictions on use of collocated remote switching modules; and (9) SCC failure to require Bell Atlantic to provide nondiscriminatory access to the feature availability matrix and street access guide databases.

JURISDICTION AND VENUE

The Court exercises jurisdiction over this matter pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. §§ 1331 and 1337.

Venue is proper under 28 U.S.C. § 1391(b) inasmuch as the SCC is located within this District. The Defendant Bell Atlantic is a Virginia corporation with its principal place of business in Richmond, Virginia. The Defendant Commissioners reside in the Eastern District of Virginia and the events giving rise to this cause of action occurred in this District. Venue is proper in the Richmond Division pursuant to Rule 4 of the Local Rules of the United States District Court for the Eastern District of Virginia.

STANDARD OF REVIEW

Summary judgment is proper if, viewed in the light most favorable to the nonmoving party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985). The essence of the inquiry that the court must make is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512 (1986).

SCOPE OF REVIEW

Since 47 U.S.C. § 252(e)(6) does not set forth the standard, procedure or scope of judicial review, this Court shall look to controlling precedent to determine the scope of review. In United States v. Carlo Bianchi and Co, 373 U.S. 709, 715 (1963), the Supreme Court held that the a federal statutory provision calling for federal judicial review which fails to indicate the standards to be used or procedures to be followed limits federal judicial review to the administrative record and prohibits de novo proceedings. See also, Smith v. Chater, 99 F.3d 635, 638 (4th Cir. 1996); United States v. A.S. Holcomb, 651 F.2d 231, 236 (4th Cir. 1981).

A. Standard of Review for Factual Findings

In the absence of a statutory authority defining the type of review, "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see also Clark v. Alexander, 85 F.3d 146, 151-52 (4th Cir. 1996)(looking to the APA and applying a federal standard of review where relevant federal statute contained no explicit standard of review); Guaranty Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 794 F.2d 1339, 1342 (8th Cir. 1986)(proper to look to the APA and apply the arbitrary and capricious standard where statute did not define the type of review).

Under this standard, a court evaluates the agency's decision to determine whether relevant factors support that decision and whether the agency has made a clear error of judgment. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). A court may only uphold agency actions on the basis articulated by the agency itself. See Motor Vehicle Mfrs. Ass'n. v. State Farm Mut., 463 U.S. 29, 50 (1983). Therefore, a court must find a rational connection between the facts found and the decision rendered. Id. at 43.

B. Standard of Review for Legal Determinations

The federal district court must determine whether state commission statements and agreements meet the requirements of section 251 of the 1996 Act. 47 U.S.C. § 252(e)(6). While courts may grant a level of deference to a federal agency's interpretation of federal law, the same does not apply to state commissions. See Ritter v. Cecil County Office of Hous. & Comm. Dev., 33 F.3d 323, 327-28 (4th Cir. 1994)(granting some deference to the state agency's legal interpretation of federal law because that interpretation had been reviewed and approved by the Department of Housing and Urban Development). Therefore, the court reviews de novo whether a state agency's interpretation of the 1996 Act is consistent with federal law. Id. at 328.

CROSS MOTIONS FOR SUMMARY JUDGMENT

A. Access to Unbundled Network Elements as Required by the 1996 Act

Section 251(c)(3) of the 1996 Act imposes a duty on incumbent local exchange carriers ("ILEC") to "provide to any requesting telecommunications carrier for the provision of telecommunications service, nondiscriminatory access to network elements on an unbundled basis." Id. The rates, terms and conditions must be "just and reasonable, and nondiscriminatory" under the terms of the agreement and in compliance with §252 of the 1996 Act. Id. A "network element" is "a facility or equipment used in the provision of a telecommunications service." 47 U.S.C. §153(29). This includes the "features, functions, and capabilities that are provided by a facility or equipment" as well as subscriber numbers, databases, signaling systems. See id. Information relevant to billing, collection transmission, routing or other provisions of telecommunications service is also encompassed within the meaning of network element.

MCI contends that the approved Interconnection Agreement between it and Bell-Atlantic violates this provision in regards to access to "dark fiber," "loop distribution," directory assistance and data on the features Bell Atlantic's switches can provide to customers.

(1) Access to Dark Fiber

Dark Fiber is optic transmission cable that is not operational because it lacks electronics necessary to transmit telecommunications. Record, p. 3776 (SCC Staff Report, p. 42). Although dark fiber is capable of use, by definition, it is not in immediate active use. Consequently, the SCC denied MCI access to Bell Atlantic's dark fibers. The SCC and Bell Atlantic contend that it is not subject to unbundling because it is not "used in the provision of telecommunications service." See §153 (29). Since it is not in use, dark fibers also do not provide any service.

When the statutory language is "unambiguous and the statutory scheme is coherent and consistent," the Court's inquiry is at an end. See Robinson v. Shell Oil Co., 117 S.Ct. 843, 846 (1997). Plainness or ambiguity within a statute rests on the language itself, the underlying context and the broader context of the statute as a whole. See id. In this case, the term "used" is ambiguous because it provides no temporal restrictions. As the SCC and Bell Atlantic insist, dark fiber may be disqualified because it is not in immediate use. It is equally plausible, however, that the term "used" means capable of being used in the future. The underlying statutory context does not conclusively support either interpretation.

In the broader context, Congress enacted the 1996 Act to foster competition in local markets. It would comport with this context to interpret "used" as encompassing network elements which are capable of immediate use. Therefore, Bell Atlantic should have at most an obligation to provide access to dark fibers which currently exist in ducts, conduits and poles or otherwise run with "lit"

fibers but not dark fibers which are a part of its inventory in warehouses, on shelves or in similar storage facilities. However, this is not the end of the matter.

Under §251(d)(2)(B), "In determining what network elements should be made available ... the [SCC] shall consider at a minimum whether. . .the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." Id. To the extent dark fibers exist next to lit fibers, MCI must show that denying access would result in an impairment. An impairment exists when "the failure of the incumbent LEC to provide access to the network element would. . . decrease the quality of, [or] . . . increase the financial or administrative cost of, the telecommunications service a requesting telecommunications carrier seeks to offer." 47 C.F.R. § 51.317(b)(2). The Record indicates that MCI introduced evidence that dark fiber is necessary in provision of its local services. See David Agatston et al., Network Implementation: Requirements for Interconnection, Access to Unbundled Elements and Collocation 31 (Aug. 26, 1996) (Ex. MCI-6).

While MCI may deem access to dark fibers essential, MCI has not satisfactorily shown that it will suffer an impairment. As the SCC Staff notes, the absence of access to Bell Atlantic's dark fiber will require MCI "to secure access which it may, to other, available unbundled network elements" to provide service. SCC Staff Report at 42. Record 3776. While such access may inconvenience MCI, it does not rise to the level of impairing its ability to provide local communications service.

The Court GRANTS summary judgment for the SCC and Bell Atlantic on this claim.

(2) Loop Distribution Element